

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
SIDNEY C. SMITH and RAI ENTERPRISES,  
INC.,

Plaintiffs,

-against-

NELSON REYES,

Defendant.  
-----x

**MEMORANDUM AND ORDER**  
CV 07-4296 (FB) (JO)

ORIGINAL

D & F  
C/M

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ JUL 21 2008 ★

**BROOKLYN OFFICE**

*Appearances*

*For Plaintiffs:*

STUART L. MELNICK, ESQ.  
Stuart L. Melnick, LLC  
270 Madison Avenue, Suite 1410  
New York, NY 10016

*For the Defendant:*

JAN V. FARENSBACH, ESQ.  
277 Broadway, Suite 1405  
New York, NY 10007

**BLOCK, Senior District Judge:**

On May 9, 2008, Magistrate Judge Orenstein issued a Report and Recommendation ("R&R") recommending that on account of the plaintiffs' failure to prosecute their case the Court dismiss this action *sua sponte*, without prejudice, pursuant to Federal Rule of Civil Procedure 4(m).<sup>1</sup> The R&R directed the plaintiffs' counsel to serve a copy of the R&R on the defendant and to file proof of service with the Court no later than May 16, 2008; it stated that "[a]ny objections to this Report and Recommendation must be filed with the Clerk no later than May 27, 2008" and that "[f]ailure to file objections within this period waives the right to appeal the District Court's Order." R&R at 2. Copies of the

<sup>1</sup> "If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time."

R&R were served on May 15, 2008, and proof of service was timely filed the next day. *See* Docket Entry 5 (Certificate of Service). No party has filed any objections to the R&R.

If clear notice has been given of the consequences of failure to object, and there are no objections, the Court may adopt the R & R without *de novo* review. *See Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."). The Court will excuse the failure to object and conduct *de novo* review if it appears that the magistrate judge may have committed plain error, *see Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000); no such error appears here. Accordingly, the Court adopts the R&R without *de novo* review and dismisses plaintiffs' action *sua sponte*, without prejudice, pursuant to Federal Rule of Civil Procedure 4(m).

**SO ORDERED.**

s/FB

FRÉDÉRIC BLOCK  
Senior United States District Judge

Brooklyn, New York  
July 17, 2008